United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2603

To be argued by
MICHAEL D. ABZUG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2603

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL CAMPOREALE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Preliminary Statement

Michael Camporeale appeals from a judgment of conviction entered on November 22, 1974, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 73 Cr. 56, filed January 18, 1973, charged Camporeale in Count Three with perjury before a Grand Jury of the United States, in violation of Title 18, United States Code, Section 1623.*

* Counts One and Two of Indictment 73 Cr. 56 charged Anthony Politi and eleven others (not including Camporeale) with operating an illegal gambling business (18 U.S.C. § 1955) and conspiracy to do so (18 U.S.C. § 371). Those counts were tried on a stipulation of facts before Judge Lasker, sitting without a jury, and all defendants were convicted. Their appeal (Dkt. Nos. 74-1917, 1946) was argued on November 25, 1974 and is *sub judice* in this Court.

The trial commenced on September 23, 1974. On September 25, the jury found Camporeale guilty as charged.

On November 22, 1974, Judge Lasker sentenced Camporeale to six months imprisonment, to be followed by two years probation.

Camporeale is at liberty on bail pending this appeal.

Statement of Facts

The Government's Case

On November 17, 1972, Michael Camporeale appeared before a Federal Grand Jury investigating alleged violations of Title 18, United States Code, Section 1955. While testifying under a grant of immunity (Title 18, United States Code, Sections 6001 *et seq.*), Camporeale was questioned concerning his association with the gambling activities in Orange, Westchester and Dutchess Counties of Anthony Politi, Philip Politi, Gerald Politi, Louis Visconti, David Weygant, Patricia Hyatt, Eileen Moran and others (GX 5; Tr. 137-138).* During his November 17th appearance before the Grand Jury, Camporeale was shown photographs of several individuals including two of Visconti (GX 11) and one of Weygant (GX 12). Camporeale repeatedly denied having any recollection of meeting Visconti or Weygant (GX 1, pp. 26-27, 51-52).

Five Special Agents of the Federal Bureau of Investigation testified at trial that while they were investigating a policy gambling operation they each observed Louis Visconti meet the defendant Michael Camporeale. Collectively, their testimony established that Visconti had met Camporeale a total of twelve times from February 10, 1972 to May 8, 1972

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* "Tr." refers to the trial transcript, "GX" to Government's Exhibits at trial.

(Tr. 53, 56, 57, 59-63, 89, 104, 108, 116). Before many of these meetings with Camporeale, Visconti was seen meeting with Laurence Johnson, from whom he would receive envelopes or packages.* (Tr. 28). Shortly thereafter, Visconti was observed to drive to one of eight different locations in Beacon, Fishkill, or Newburgh, New York, meet Camporeale, and talk with him.

In addition to the Special Agents' testimony, the Government introduced in evidence several photographs which showed Camporeale meeting with Visconti on February 22 and 23, 1972 (Tr. 104-107, 118-121; GX 8, 8A, 9 and 9A).

Finally, Agents Robert Reutter and Carl Amaditz both testified that on May 8, 1972, they observed David Weygant and Louis Visconti travel in Weygant's car from Newburgh to Smith Clove Road in Central Valley, New York. There, Visconti and Weygant parked, got out of Weygant's car, and got into Camporeale's Dodge, where they talked with Camporeale for several minutes (Tr. 64-65, 144-145).

David Weygant testified that in May of 1972, he was hired by Louis Visconti to pick up policy work and collect money at several betting locations in Orange County (Tr. 160-164). Weygant recaled that on the third day of his employment by the gambling operation he was instructed by Louis Visconti to drive him to Central Valley. There, Visconti introduced him to Camporeale while they were seated in Camporeale's car (Tr. 167-168). Acting pursuant to the instructitons which Camporeale gave to him during this meeting, Weygant met Camporeale at a Howard Johnson's Motor Lodge the following day and gave him a package of policy work. As he received the package, Camporeale asked Weygant if he had been followed (Tr. 168-170). Camporeale then instructed Weygant to bring a

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* David Weygant testified that he took policy work and cash from Lawrence Johnson and transferred it to Visconti (Tr. 164-165). Lawrence Johnson was convicted of Counts One and Two of 73 Cr. 56.

young woman selected by Visconti to a restaurant at Bear Mountain the following day. Accordingly, the next day Weygant brought Eileen Moran to the Bear Mountain Inn, where he introduced Moran to Camporeale and Camporeale introduced them to Pat Hyatt. Weygant testified that at this meeting Moran gave Hyatt the policy package that Weygant had previously given to her (Tr. 174). Weygant stated that after this meeting, he would pass the policy work that he collected on a particular day to Moran. Camporeale explained that using Moran and Hyatt to pass the policy work would insulate him from law enforcement officials (Tr. 210). Photographs showing Weygant passing a policy package to Moran were received into evidence. (Tr. 177; GX 10 and 10A).

The Defense Case

The defense called one witness, Addie Corradi, to substantiate Camporeale's claim that he was under the influence of methadone when he testified before the Grand Jury.* Corradi testified that from May 24, 1971 through April 9, 1974, Michael Camporeale was her patient at the Mount Vernon methadone clinic.**

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* Before Corradi testified, the defense stated that her testimony would be relevant only in so far as it proved that Camporeale took methadone on the day of his Grand Jury testimony. The defense admitted that its only witness was not qualified to testify whether such a circumstance, if it occurred at all, would influence Camporeale's ability to testify truthfully (Tr. 243).

** Although Corradi could testify that Camporeale was taking methadone while he was her patient, she could not specify whether he took methadone on November 17, 1972, without examining the hospital's records which she was not asked to bring to Court. When defense counsel asked Corradi whether, according to the hospital records, Camporeale had taken methadone on November 17, 1972, the Court sustained the Government's objection on the grounds that response would violate the best evidence rule (Tr. 244).

ARGUMENT

POINT I

Camporeale is not entitled to a new trial on the ground that, unbeknownst to his counsel, during the jury's deliberations the court clerk transmitted to the jury Grand Jury minutes of Camporeale's testimony containing references to his prior criminal record.

After his conviction but before sentence, Camporeale filed a motion to set aside the verdict on the ground that the court clerk, without Camporeale's counsel's knowledge, had transmitted to the jury during its deliberations Grand Jury minutes in evidence which disclosed Camporeale's prior criminal record. At the time of sentencing Judge Lasker denied the motion, finding that the claim had been waived and the error in any event harmless. (Tr. 312-314) Camporeale's claim to the contrary on appeal is insubstantial.

On November 17, 1972, Camporeale testified before the Grand Jury in the Southern District of New York. Part of his testimony on that date constituted the perjury charged and proved in this case. During the course of that appearance, Camporeale also gave the following testimony (GX 1, pp. 28-29):

> "Q. Have you ever been arrested? A. Yes.
>
> Q. How many times? A. Four—we'll say, roughly—I'm not sure how many.
>
> Q. When was the first time? A. I guess when I was a kid; I stole a car when I was 15.
>
> Q. Were you convicted on that? A. No, youthful offender status, I think.
>
> Q. When was the next time you were arrested?

A. I am not sure. I had a few disorderly conduct charges.

I know in '68 I was convicted of possession of drugs. That is the one I can be sure of.

A six-month sentence was the outcome.

Q. What drug? A. Heroin.

In 1970 I was arrested twice for petit larceny. The outcome was $50 fine both times.

Those are the ones I'm sure of. I know there were a couple of disorderly conducts. I don't know when.

Q. Were you ever addicted on narcotics? A. Yes.

Q. Are you currently addicted? A. I am on the Methadone treatment."

At trial the transcripts of Camporeale's November 17, 1972 appearance, and of two other appearances by him, were offered in evidence upon stipulation of counsel. It was stated by the prosecutor that counsel had agreed that "[t]here is certain material contained in here that it is deemed not proper for the jury to see and if they ask for it I would deem that they be expunged. They don't relate to this particular case, that is why." The transcripts were then ordered "received in evidence on the basis of the agreement between counsel for the defendant and for the Government." (Tr. 134-136; GX 1, 2, 3).

At the end of his charge, the trial judge told the jury it might send for such exhibits as were wanted during its deliberations (Tr. 301). After the charge and withdrawal of the jury at 10:30 A.M. to begin deliberating, Judge Lasker said to counsel (Tr. 304-305):

"The Court: Mr. Silverman and Mr. Geller, I will be commencing another trial at eleven o'clock, a non-jury trial, so I will ask you if you will make yourselves comfortable in the benches. I see some of the people are here, but I won't be starting until eleven o'clock."

The record then reflects the following (Tr. 305-306):

"(At 10:35 a.m. a note was received from the jury.)

The Court: In the absence of both counsel from court without the permission of the Court, the Court has received a message from the jury which the clerk is instructed to mark as Court's Exhibit 2, which reads:

"Please furnish all pictures relating to this case. Please furnish defendant's testimony before the Grand Jury which was read to us in court."

I am instructing the clerk to give the marshal all the pictures which are exhibits in this case.

Only give them those that have been received in evidence, of course.

Furnish the three transcripts of the Grand Jury testimony. If you want to find them I will identify them for you. I think they are marked Exhibits 1, 2 and 3.

You are going to have to get the attorneys. There was something they wanted to cut out of the Grand Jury minutes.

When you bring them back let them assist you in getting all this stuff together.

(At 11:15 a.m., in open court, jury present)

The Court: Ladies and gentlemen, I received two notes from you. One asked for certain exhibits and I asked the court clerk to mark that Court Exhibit 2, which I believe he did, and I believe you were furnished with the exhibits. The other is a message stating that you have reached a verdict.

I will give this to the court clerk and ask him to mark it as Court Exhibit number 3, and I will ask him to proceed to take your verdict.

(Jury role called, all present)

The Clerk: Madam Forelady, have you agreed upon a verdict?

* * * * * "

There was no suggestion to the trial court by counsel when the verdict was returned that anything had reached the jury room improperly.

Subsequently, on an affidavit sworn to October 22, 1974, defense counsel moved to set aside the verdict. The basis for the motion was that defense counsel and the prosecutor had agreed that the portions of Camporeale's Grand Jury testimony relating to his prior criminal record, quoted, *supra,* at pages 5-6, ". . . would be eliminated before the minutes were sent to the jury deliberation room." According to defense counsel's affidavit, after the jury retired, it requested the minutes at a time when both defense counsel and the prosecutor were outside the "jury room [sic]", and they were transmitted to the jury by the court clerk without deletion of Camporeale's testimony about his prior criminal record. At some point later, the clerk advised defense counsel of what had transpired.

By affidavit of November 11, 1974, defense counsel supplemented his recital of what had occurred. According to this supplemental affidavit, after being advised by the court clerk of the transmittal of the unredacted Grand Jury minutes to the jury, defense counsel met with the prosecutor, Mr. Silverman. According to defense counsel's supplemental affidavit, "It is your deponent's belief that both Mr. Silverman and myself agreed that it would not be fruitfull [sic] to ask the Court or the clerk of the Court to remove the Grand Jury minutes from the jury room. In other words both attorneys agrred [sic] to take no action in regard to the Grand Jury minutes."

In denying the motion, Judge Lasker stated that he had authorized the clerk to transmit the Grand Jury minutes to the jury on its request, believing that the deletions which had been agreed to had been made. Judge Lasker also pointed out that he was not advised at any time before the verdict that the Grand Jury transcripts had been delivered

to the jury in unredacted form. Accordingly, the Judge held the claim to be waived. Judge Lasker also held that since Camporeale's prior involvement with heroin had been brought out at the trial, the sending of the unredacted Grand Jury testimony to the jury was harmless (Tr. 312-314).

Judge Lasker was clearly correct on both grounds.

As to the first ground, defense counsel, having failed to redact the Grand Jury minutes, absented himself from the courtroom without permission and was not present when the jury sent for the exhibits five minutes after it retired, even though he knew that the jury had been instructed that it might send for exhibits. Thereafter, while the jury was still deliberating, defense counsel learned that the unredacted Grand Jury minutes had been sent to the jury room, but he made no effort to have them retrieved. Camporeale is thus foreclosed from making his present contention. *Rumely* v. *United States*, 293 F. 532, 557-558 (2d Cir.), *cert. denied*, 263 U.S. 713 (1923); *United States* v. *Strassman*, 241 F.2d 784, 786 (2d Cir. 1957); *United States* v. *Burket*, 480 F.2d 568, 570-571 (2d Cir. 1973); *United States* v. *Yoppolo*, 435 F.2d 625, 626-627 (6th Cir. 1970).

On the second point, Judge Lasker was also correct that much of what was contained in the allegedly offensive passage in the Grand Jury testimony was already before the jury. Defense counsel called a witness to testify that Camporeale was in a methadone program from 1971 to 1974 (Tr. 241-248), which a juror of any experience would have realized meant that Camporeale had been a heroin addict. In his opening and his summation defense counsel re-emphasized that at the time of his Grand Jury testimony Camporeale was in a methadone program (Tr. 20, 258). Defense counsel also pointed out in summation that "[i]n 1972 Michael Camporeale was involved in bookmaking and policy. . . . We concede that he was involved in gambling

in 1972." (Tr. 253) Against this background, the statements in the Grand Jury testimony that Camporeale had been given youthful offender status for a car theft when he was 15, had served 6 months for possession of heroin, and had been twice in 1970 fined $50 for petit larceny can have had little impact to the jury.

There are two further reasons why reversal is not warranted on this ground. First, there is nothing in the record to show that the jury read the allegedly prejudicial passage after it received the Grand Jury testimony, and its note, requesting the ". . . defendant's testimony before the Grand Jury which was read to us in court" (Tr. 305), suggests that its interest in the transcript did not embrace that portion in which the passage about Camporeale's prior criminal record appears. Second, even if there was any prejudice to Camporeale from the jury's receipt of the unredacted Grand Jury minutes, it must be assessed in the light of the Government's case, which here was overwhelming. *United States* v. *Bishop*, 492 F.2d 1361, 1364-1366 (8th Cir. 1974). The receipt of the unredacted Grand Jury minutes by the jury clearly could have had no effect on the outcome of the case.

POINT II

Camporeale's perjury was plainly proved.

Camporeale makes a half-hearted argument that his Grand Jury testimony was not proven to be perjurious. The argument is based on a claim that while the testimony specified in the indictment contained positive statements by Camporeale that he had no recollection of ever having seen Visconti or Weygant, whose photographs were displayed to him in the Grand Jury, at other places in his testimony he was equivocal about not having met Visconti, saying that he was not sure whether he had met him and that he was not going to say he hadn't met him (Tr. 215-

216). From these responses, Camporeale, relying on *Bronston* v. *United States*, 409 U.S. 352 (1973), asserts that "the perjury indictment was obtained upon evidence that as a matter of law was so equivocal that it did not amount to perjury." (Brief at 2). The contention is without merit.

Bronston, on which Camporeale relies, is wholly distinguishable. In that case, the testimony assigned as perjurious was an answer which was totally unresponsive and misleading but technically true. Here, the perjury count as submitted to the jury by the Court * contained answers, given at the conclusion of Camporeale's Grand Jury testimony about Visconti and Weygant, which were as direct, unequivocal and demonstrably false as they could be:

> "Mr. Friedman:
>
> * * * * *
>
> "Let us go over this again. I just want to go over this.
>
> With respect to Government's Exhibit 1, dated October 25, 1972; number 3 and 3-A, dated November 17, 1972; number 5, dated October 18, 1972; number 6, dated October 18, 1972; number 7, dated October 18, 1972; number 20, dated October 25, 1972; number 5, dated November 17, 1972; number 4, dated November 17, 1972; number 17 dated October 25, 1972; number 21, dated October 25, 1972; number 11, dated October 18th, 1972; number 15, dated October 25th, number 17, dated October 25th; number 18, dated October 25th; and 14 dated October 18th, you never have seen those individuals, is that correct? A. As far as I can remember, no.

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* Because the Grand Jury transcript did not establish clearly what photographs were being shown to Camporeale in one instance when he denied knowing the persons shown in them (GX 1, at p. 27) Judge Lasker, on defense counsel's motior and with the Government's consent, struck that part of the testimony set forth in the count (Tr. 233-236).

Q. So you cannot remember seeing these fellows at all, is that correct? A. No, sir.

Q. You are sure you cannot remember seeing them, is that correct? A. Yes.

Q. You are sure you cannot remember ever seeing those individuals whose photographs I just showed you? A. Not that I can remember, no. I might have seen them.

Q. You are sure you never remember having seen them, is that correct? A. Right."

Moreover, the testimony to which Camporeale points did no more than evasively reserve the possibility of Camporeale's having met Visconti under the various circumstances posed by the prosecutor's questions without a present recollection of having done so. The testimony specified in the perjury count is of similar purport—that while he might have seen Visconti and Weygant, he did not recall having done so when he testified. Given the undisputed proof of Camporeale's many meetings with both men, the jury had ample evidence from which to conclude that Camporeale's claimed lack of recollection was willful perjury. *United States* v. *Sweig*, 441 F.2d 114, 116-118 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

In an effort to draw attention from the weakness of this argument, Camporeale also renews an argument made below (Tr. 224-227) that the questioning of Camporeale had no legitimate purpose and was intended simply to lure Camporeale into committing perjury. The basis for the argument is a claim that Camporeale was deliberately not shown surveillance photographs taken prior to his Grand Jury appearance depicting Camporeale in the company of the very two men* he denied knowing before the Grand Jury.**

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* Camporeale is wrong, however, in his assertion that there were any photographs showing him with Weygant.

** In an attempt to make his case stronger on this point

[Footnote continued on following page]

This argument is totally without merit. It is obvious from the record of the trial that at the time of Camporeale's Grand Jury appearance the prosecutor was seeking information relevant to the Grand Jury's investigation, not a perjury indictment. The Government already had substantial evidence of Camporeale's participation in an illegal gambling business. (*E.g.*, GX 1, at p. 65). He was brought before the Grand Jury, and, after initially asserting the privilege, was granted immunity. At the outset of his testimony on November 17, 1972, he acknowledged that he had been told that his "activities have been under surveillance for a considerable period of time . .." (GX 1, p. 26). When Camporeale elaborately feigned an inability to recall Visconti, the prosecutor threatened him with a perjury charge and repeatedly and perhaps too forcefully demanded that the witness answer responsively and truthfully:

Camporeale claims that the trial judge expressed dissatisfaction with the fact that Camporeale was not shown these surveillance photographs:

> "The Court below obviously disturbed over the manner of presentation of this case and was constrained to note that a strong argument could be made and that
>
> 'It does seem to me . . . as to be very strong evidence of an intention willfully to *hang a man for perjury.*'"

(Brief at 8; emphasis in original.)

In fact, what Judge Lasker said was "[I]t does seem to me *not so arbitrary or capricious* as to be very strong evidence of an intention willfully to hang a man for perjury." (Tr. 230; words omitted from Camporeale's brief italicized). Moreover, Judge Lasker in the passage quoted from was not even talking about the surveillance photographs but was rather stating his tentative approval of the prosecutor's having brought out Camporeale's prior criminal record before the Grand Jury (Tr. 229-230).

The use of ellipses in the quotation in Camporeale's brief changes the meaning of Judge Lasker's statement completely and is grossly misleading. We assume that this misrepresentation of the record by appellate counsel was inadvertent and not "a practice which departs from ethical standards expected of such counsel." *United States* v. *Pacelli*, 491 F.2d 1108, 1120 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3208 (October 15, 1974).

> "Q. . . . Do you want to go down in front of the Judge and have him direct you to give responsive answers, sir? Is that what you want? Is that what you came here for? A. I tell you I could have met the guy.
>
> Q. Who are you trying to fool?" (GX 1, at p. 38)

Moreover, the claim that the prosecutor knew when Camporeale came before the Grand Jury that Camporeale had been photographed with Visconti was in no way supported by the record. But even if the prosecutor had been aware of the photographs, he would have been under no obligation to disclose their existence to Camporeale, even if that meant that Camporeale would persist in lying and would ultimately be charged with perjury. *United States* v. *Sweig, supra,* 441 F.2d at 120-121; *United States* v. *Fiorillo,* 376 F.2d 180, 184 (2d Cir. 1967); *United States* v. *Winter,* 348 F.2d 204, 210 (2d Cir.), *cert. denied,* 382 U.S. 955 (1965); *United States* v. *Nickels,* 502 F.2d 1173, 1176-1177 (7th Cir. 1974); *United States* v. *Dowdy,* 479 F.2d 213, 230 (4th Cir.), *cert. denied,* 414 U.S. 823 (1973). Judge Lasker properly disposed of Camporeale's argument below under a stricter standard than in fact applies (Tr. 227-228):

> "If this becomes a critical point, I will, of course, review the record, but my recollection is, and I was listening for it because you were bringing it out, that the proof was that there was no proof and certainly no weighty proof that Mr. Friedman was aware at the time of the examination that there were photographs showing Mr. Camporeale and Mr. Visconti together.
>
> The next question that arises is whether if Mr. Friedman was aware that there were such photographs he was under any obligation to put them before Mr. Camporeale. I rather doubt that.
>
> I think the question of due process or entrapment or pressure or whatever it is that you are putting

before me here would depend on proving that Mr. Friedman intended willfully to bring about a prosecution for perjury here, and the transcript, as I react to it at the moment, anyway, is only that Mr. Friedman was, indeed, trying to get certain answers from Mr. Camporeale, but not that he was willfully trying to see to it that Mr. Camporeale was indicted for perjury."

POINT III

The Grand Jury which heard the perjured testimony in this case properly returned the indictment.

Camporeale complains that it was improper for the same Grand Jury which heard his testimony to return the indictment for perjury because the grand jurors were ". . . witnesses to this transgression." (Brief at 18) The contention is unsupported by any citation of authority and is without merit.

First of all, it is the settled practice for the same Grand Jury which has heard the perjured testimony to indict for it. *E.g., United States* v. *Kahn,* 472 F.2d 272 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973); *United States* v. *Carson,* 464 F.2d 424 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972); *United States* v. *Sweig, supra.* Moreover, in *United States* *Garcia,* 420 F.2d 309, 311 (2d Cir. 1970), in rejecting the appellant's claim that the United States Attorney had violated Rule 6 of the Federal Rules of Criminal Procedure by disclosing the minutes of his Grand Jury testimony to another grand jury to secure his indictment for perjury arising out of that testimony, this Court held:

> "The rule itself provides that disclosure 'may be made to the attorneys for the Government for use in the performance of their duties.' Surely the performance of his duty by the United States Attorney re-

quired him to prosecute any perjury committed before a grand jury, *and to do so before the same grand jury or any grand jury constituted for the district where the perjury had been committed . . .*" (emphasis supplied).

Camporeale's other claim—that the grand jurors might have been affected in returning the indictment by the evidence before them of Camporeale's prior criminal record—is without merit. The argument was rejected by the trial judge (Tr. 229-230). No showing was made below, nor is one made here, that suggests that Judge Lasker erred. See *United States* v. *Fox,* 425 F.2d 996, 1000-1001 (9th Cir. 1970). See also *United States* v. *Riccobene,* 451 F.2d 586 (3d Cir. 1971). Moreover, the proof of Camporeale's perjury was so plainly established before the Grand Jury that knowledge of Camporeale's meager prior record can have been of little effect.*

POINT IV

The best evidence rule prevented Addie Corradi from testifying about the contents of the records of the Mount Vernon Methadone Clinic.

At trial, Camporeale attempted to persuade the jury that he was under the influence of methadone during his November 17, 1972, Grand Jury appearance by calling Addie Corradi and asking her whether the records at the Mount Vernon Methadone Clinic reflected that he had taken methadone on the day in question. Camporeale asserts that the trial court committed error when it prevented the witness from testifying about the contents of those records

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* Both David Weygant and Special Agent Robert Reutter testified before the Grand Jury regarding Camporeale's activities. The Government will be prepared at the oral argument to hand up the relevant Grand Jury minutes if the Court wishes to examine them.

because it "appears" that the records would have established that Camporeale took methadone before his Grand Jury appearance.

It is well established that "the best evidence rule [requires] that the contents of a writing must be proved by the introduction of the writing itself, unless its absence can be satisfactorily accounted for." *Herzig* v. *Swift & Co.*, 146 F.2d 444, 446 (2d Cir. 1945), *cert. denied*, 328 U.S. 849 (1946); Rule 1002, Federal Rules of Evidence. In this case, the witness was unable to recall, independently of the records, whether Camporeale had taken methadone on the day of his grand jury appearance. The records were not available to be introduced into evidence because Camporeale had neglected to ask the witness to bring them to court. (Tr. 247) Compare *United States* v. *Knohl*, 379 F.2d 427, 441 (2d Cir. 1967).

Accordingly, the witness' testimony was properly excluded. Defense counsel made no request for a postponement of the proceedings so that the records could be produced.

POINT V

Section 1623 of Title 18, United States Code, is constitutional.

Camporeale argues that the absence of the "two witness rule" in perjury prosecutions brought under Section 1623 is unconstitutional. His precise claim has been rejected in this Circuit, *United States* v. *Lee*, Dkt. No. 74-1925 (2d Cir., January 9, 1975) slip op. at 1229-1230, *United States* v. *Ruggiero*, 472 F.2d 599, 606 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973), and in others, *United States* v. *Devitt*, 499 F.2d 135, 139-140 (7th Cir. 1974), *United States* v. *Koonce*, 485 F.2d 374, 377-378 (8th Cir. 1973), *cf. United States* v. *Clizer*, 464 F.2d 121, 123 (9th Cir.), *cert. denied*, 409 U.S. 1086 (1972).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN, III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24th day of February, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

IRVING ANOLIK, ESQ.
225 Broadway
New York, N. Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

24th day of February, 1975

LAWRENCE S. FELD
Notary Public, State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1976

Lawrence S. Feld